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U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket Room
SA-29
2201 C Street NW.
Washington, D.C. 20530

Re: **Comments on Proposed Inter-Country Adoption Act of 2000 Regulations**
Docket Number State/AR-0a/96

Dear Sir or Madam,

Under separate cover, others will comment the specifics of the regulations as proposed. This document is intended to address several overarching themes and concerns regarding implementation of the Intercountry Adoption Act.

Introduction

It has been nearly ten years since the United States signed the Hague Convention on Intercountry Adoption. It has been nearly six years since the White House transmitted the treaty to the Senate for ratification. It has been nearly four years since the Senate ratified the treaty and the enabling legislation was signed into law. It has been three years since the State Department held a series of public informational meetings to elicit additional information about international adoption. Yet despite nearly a decade of discussion, debate, Congressional hearings, legislation, meetings and a myriad of detailed comments, the State Department seems to have no grasp of adoption practice or business issues. The proposed regulations certainly demonstrate the Department's lack of insight into the actual economics of international adoption or how the abuses which led to passage of the Intercountry Adoption might be tempered or eliminated. Ultimately, the proposed regulations do a disservice to both industry and consumers and perhaps even fail in many respects to harmonize the mandates of the treaty with federal law.

The focus of the proposed regulations is fundamentally misguided. The regulations as constructed effectively create a new business enterprise rather than focusing on the reform or elimination of bad practices which would result in more effective protections for both business and consumer interests. The regulations appear to create a new arena - parallel to the business of adoption - which will be responsible for accreditation, oversight and elements of enforcement.

Unfortunately, this new industry is entirely undefined in a document filled with broad statements and little detail. The only clear agenda in the regulations seems to be the creation of multiple private entities discharging governmental responsibilities in a way that will only lead to more confusion in a field desperately in need of more transparency. The structures outlined for the accreditation process will create fundamental conflicts of interest in the relationship between the accreditor and those agencies being accredited. This is exactly the scenario that Congress sought to eliminate when they passed the Intercountry Adoption Act. The proposed regulations, as they define the accrediting process, create new conflicts of interest.

It must also be said that the overarching tone of the regulations - with their repeated references to concerns about the impact the regulations will have on industry, especially small providers - is deeply disturbing. There are many fine service providers in the field. However, even the best providers have been subjected to a lack of leadership on the part of the State Department. Additionally, by virtue of the lack of regulation of the business of adoption, high quality, experienced providers are painted with the same brush as bad actors. The State Department is not a business development arm of the adoption industry. Good providers will accept, even welcome, the challenge of greater transparency. Those that do not should leave the field.

Accreditation

With respect to proposed accreditation the apparent lack of insight and preparation on the part of the Department is deeply troubling. Statements such as *"the need to find competent and willing accreditation entities . . . the Department did not want to create inflexible regulations that would discourage any accrediting entity from seeking designation . . . "* betray a complete failure on the part of the Department to even contemplate the necessary capacity building to meet the new mandates despite nearly a decade of discussion. The State Department has had ten years to create its own accrediting function or, at a minimum, determine appropriate models and standards, as well as to cultivate and certify qualified accreditors from the private sector. The fact that, after a decade of deliberations, the State Department feels it has to lower standards and carelessly shift responsibility to unnamed outside groups - who many themselves lack international adoption experience - is deeply troubling.

The Department appears to have ignored input from a variety of sources regarding the accreditation model it seeks to promote. The Department has been cautioned repeatedly during this process that current social service accreditation models will not provide quality control necessary to root out existing abuses and to implement the Treaty. The vague proposals put forth here bespeak either a failure to grasp operational issues and/or complete abdication of responsibility. Furthermore, with no identification of who accreditors will be - or even could be - it is impossible to endorse or even intelligently comment on proposals. There appears to be little or no thought given to how to avoid conflicts of interest. State seems intent on ensuring accreditation for every provider currently in the adoption business. The accreditation process is not an entitlement. Indeed, not all providers should be accredited. But more important, the State Department is a law enforcement agency not a trade association. In this case, accreditation is not voluntary. The Department should raise, not lower, standards for entry into the business. The standards that are established need to be clearly defined and articulated. The proposed regulations do not achieve that goal.

Ultimately, the accreditation process as proposed does no favors to either business interests or consumers. Who are the accreditors? How much will it accreditation cost? How long will it take? How can consumers know if an agency has been denied accreditation? None of these questions are answered - either for the industry or consumers. By shifting responsibility for accreditation to an unknown private entity or entities who are likely to have significant industry ties the possibility of inappropriate manipulation of the accreditation process to create unfair competitive advantages is virtually certain

While the identities of prospective accreditors is largely unknown, it has been reported that some states are seeking to become accrediting entities. Under no circumstances should any public entity be permitted to become an accreditor. The Intercountry Adoption Act was enacted at least in part as a result of the states' inability to effectively regulate adoption. Also, the sovereign immunity granted to states creates a conflict of interest in this context. Even if states waived their right to immunity, it is unlikely that consumers would be on a level playing field with respect to due process.

Liability Insurance Requirements

One positive aspect of the proposed regulations is the requirement that adoption agencies and their contractors, foreign and domestic, hold liability insurance as one means of protecting the interests of their clients. It should be noted that, while numerous industry interests have attempted to persuade the State Department that no such coverage exists, coverage is readily available to qualified agencies. For more information about liability insurance for social service and adoption providers contact: The Lexington Group, 100 Summer Street, Boston, MA 02110, 617.330.8400. They provide policies compliant with the proposed regulations. Their products are similarly available through their parent company, the American International Group, to cover activities carried out by foreign agents and employees of service providers in all of the jurisdictions currently sending children to the United States for adoption. The estimated cost of these comprehensive policies may be as low as $300 per adoption, a cost most consumers would happily assume.

Cash Payments

On the issue of fee policies and procedures the proposed regulations appear to virtually ratify existing abuses. First, direct cash payments should be prohibited, not "minimized." While it may be that currency is required, those payments should be facilitated by service providers via wire transfers, a common practice in most countries where international adoption is practiced. At a time when law enforcement officers in the US and around the world are attempting to limit cash transactions supporting international terrorism, it is astonishing that the State Department would take the position that any cash payments would be acceptable. In our experience, the actual fees charged by foreign central authorities are far less than characterized by some providers and their agents.

The claim made in the regulations that the majority of expenses in an international adoption relate to the fees charged by foreign governments is inaccurate. Such a claim in this context raises the issue noted earlier that, given all of the time, effort, and money spent on developing

these regulations the State Department still has no grasp of the fundamental realities of the cost structure of international adoption. There is no reasonable excuse for this.

Records Retention

The regulations proposed to address records maintenance are troubling. It is seems odd that anyone would question how records will be maintained or by whom. Anyone who has been to the National Archives knows the answer to that question. The US government has been maintaining copious records - both important and trivial - since the birth of the nation. Any and all records associated with this practice should be maintained in perpetuity. We can point to the recent example of an 84-year old retired business executive in Massachusetts who gained access to his original birth records after a lengthy search to demonstrate that a 75-year window of records retention is not long enough, especially at a time when life expectancies are longer than ever. Common practice in many states is that adoption records be kept in perpetuity. These records have implications not just for the individuals who were adopted, but for their future children and the relatives among future generations of birth and adoptive families. Under no circumstances should any of these records be maintained by a private or state entity.

Oversight and Enforcement

The oversight scheme in the proposed regulations is inadequate and riddled with the potential for conflicts of interest. Since the State Department appears to lack both the expertise and the interest to impose meaningful oversight of adoption providers, we are requesting that the entire oversight function required by the Inter-Country Adoption Act be shifted to the Federal Trade Commission. An interagency agreement executed by the federal government is vastly preferable to a nebulous, private system with little or no enforcement authority and inadequate sunshine in government.

Cost shifting to states, providers and consumers

A particularly troubling comment in the proposed regulations . . . *"Some groups called for extensive Federal[sic] regulation of agencies and persons without acknowledging the costs such standards would entail."* It is patently untrue to assert that no thought was given to this important aspect of implementation. Outside groups wrestled with the perennial problem of ensuring adequate authorization and appropriations for spending to offset the costs associated with creating new Executive branch responsibilities. Unfortunately, the Department appears to have persistently failed to address any cost issues related to this practice - whether administrative or commercial - in the nearly ten years it has contemplated implementation of the treaty.

There are hundreds of precedents for significant appropriations being secured by other agencies facing added enforcement responsibilities. Indeed, there are a myriad of precedents for the Administration, in general, and the Department, in particular, obtaining sums of money from Congress to implement a variety of programs contemplated over a much shorter period of time than this issue has been considered. By failing to adequately address its own capacity building in an effort to create the impression of budget neutrality, the Agency has effectively shifted those costs to states, service providers and consumers.

Money has already become the principal barrier to adoption. And, adoption is already

prohibitively expensive for many families in no small part because of the failure of the states and federal government to adequately regulate business practices. Costs are further escalated by the entry into the field of providers with poor business practices and inadequate fund-raising skills. How ironic if an exercise intended to reign in costs actually escalated them significantly.

Exportation of American Children

While one recognizes that the treaty requires receiving countries to be sending countries it does not stipulate under what conditions that reciprocity should take place. The reality is that, with literally millions of American families desperately seeking to adopt, there are virtually no circumstances under which American children should be deported to other countries for adoption. Also, current practice actually permits the sending of American children abroad for adoption despite a nearly complete inability to supervise those placements or achieve meaningful legal recourse in those cases when the adoption goes wrong. In an age where human trafficking is rampant the federal government should aggressively protect the interests of American children. In the interests of protecting the human rights of the children involved and to encourage more families in this country to adopt, this is a practice that should be sharply limited. Indeed, current practice should be suspended until the Hague Convention is effectively implemented in this country and safeguards can be put in place to protect the interests of all parties.

MSW Requirement

While it is admirable to attempt to require some level of professional accomplishment to ensure best practice, there is copious evidence to demonstrate those simply requiring M.S.W. degrees for professionals is not a meaningful response. Regardless of professional degree, in the case of international adoption, a minimum of five years of international adoption experience should be required. There are many precedents for such a requirement in other professions. Some country specific training should also be required.

States' Rights

The proposed regulations repeatedly refer to states' rights in an effort to maintain the current model of state-based regulation of adoption. This premise is wrong for two reasons.

First, Congress has demonstrated repeatedly in recent years that they have little confidence in the ability of the states to promote adoption effectively or responsibly. From the passage of the Adoption and Safe Families Act of 1997 to the Intercountry Adoption Act which the proposed regulations seek to implement, Congress has repeatedly and vociferously sent an unambiguous message that the states can no longer be trusted to administer their adoption programs without federal oversight. The federal government further regulates human trafficking in other contexts.

Second, all international adoption is inherently interstate commerce. Children are adopted from around the world by American families from a variety of foreign countries, each with a unique legal, cultural and geopolitical framework. It is preposterous to suggest that the policies of the foreign government granting the adoption should be overridden by state law. Indeed, if it is true on any level that adoption is a state law issue and we shouldn't tell the states what to do, one could argue that no state should be permitted to dictate the foreign policy of another country. The persistent efforts on the parts of the drafters of this document to promote a states' rights

argument flies in the face of Congressional intent. The very premise of the Intercountry Adoption Act was to ensure federal regulation of intercountry adoption.

Conclusion

Around the world, thousands of children are desperately in need of families. Around the United States there are hundreds of excellent adoption providers seeking to match those children with the thousands of well qualified families in this country seeking to adopt. The fundamental purpose of the Intercountry Adoption Act was to provide a simple, clearly articulated business model for intercountry adoption that would limit abuses and make it easier to everyone to participate in this important component of international child welfare. Unfortunately, the scheme the Department has developed will almost certainly penalize everyone seeking to engage in the process. It will further compromise efforts to create more, not less, transparency.

The proposed regulations create unfunded mandates for states already burdened with significant foster care adoption responsibilities. They create a constellation of confusing, meaningless regulatory requirements that will not add value to the process for either business or consumer interests. They will penalize good providers while creating a haven for less good ones. And the ultimate losers in this proposal will be the tens of thousands of children who will continue to languish around the world while the Department struggles unsuccessfully to meet its obligations in this process.

While we do not wish to extend an undertaking that has already taken far too long, it is imperative that both Congress engage in oversight of this process and that the Executive branch consider the fundamental flaws in the implementation of the Intercountry Adoption Act. The risk of temporarily reducing the numbers of adoptions from foreign countries while implementing a system to ensure better protections and outcomes is one that only a governmental authority can reasonably accomplish. In the long run, this benefits everyone.

Sincerely,

Maureen Flatley Hogan